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Supreme Court, U.S.
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NO. 86-1048

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEWEL M. COOPER

Petitioner

v.

DIAMOND M DRILLING

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BIREF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED

The questions presented by petitioner can be correctly restated as follows:

1. Whether the Court of Appeals erred in applying the well-established rule that the enforcement of a newly-created statute of limitation will not violate the Constitution by divesting a vested right if it allowes a reasonable time for those affected by the statute to assert their rights; and

2. Whether the District Court and Court of Appeals erred in concluding that petitioner did not sustain her burden of proof under laches to demonstrate that her four year and eight month delay in filing suit was not excusable or did not prejudice Diamond M Company.

INTERESTED PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Jewel M. Cooper, Petitioner

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OPINION BELOW

The opinion of the United States Fifth Circuit Court of Appeals appears in 799 F.2d 176 (5th Cir. 1986) and is included in the petitioner's brief as Appendix "A".

JURISDICTION

Jurisdiction of the Court is based on 28 U.S.C. Section 1254, which authorizes the review of cases in the courts of appeals by writ of certiorari. Petitioner, Jewel Cooper, seeks review of the judgment of the Court of Appeals dated September 8, 1986.

STATUTE INVOLVED

The statute involved herein is U.S.C. Section 763(a), enacted October 6, 1980, which provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is adequate with the exception of its characterization of the Court of Appeals' rationale in dismissing her unseaworthiness claim.

As reflected in the opinion of the appellant court below, the District Court ruled that the three-year limitation period of 46 U.S.C. Section 763(a) did not govern Cooper's claim, but nevertheless found that Cooper failed to carry her burden of proof under the doctrines of laches, and thus dismissed her suit. *See* 799 F.2d at 177.

The Court of Appeals agreed that Cooper did not sustain her burden of proving that her four year and eight month delay was reasonable or did not prejudice Diamond M Company, *Id.* at 178 n. 2, but disagreed with the District Court's conclusion regarding the application of Section 763(a). *Id.* at 177 n. 1.

In finding that Section 763(a) governed Cooper's claims, the Court of Appeals' decision *is not,* as suggested on page 4 Cooper's petition, "based on the fact that such retroactive application would not destroy any of her substantive rights." Rather, the Court of Appeals afforded Section 763(a) prospective application, which granted Cooper three years from the effective date of Section 763(a) -- a reasonable time for her to assert her rights within which to file suit. Since Cooper filed suit more than three years *after* the effective date of Section 763(a), her unseaworthiness claim was time-barred. *Id.* at 178. Moreover, the Court of Appeals agreed with the District Court that Cooper's unseaworthiness claim was barred by laches as well. *Id.* at n. 2.

SUMMARY OF ARGUMENT

The Court should refuse to grant a writ of certiorari to review this matter, since it does not conflict with any other decision construing the effect of 46 U.S.C. Section 763(a). The Court of Appeals followed an established rule of statutory construction by permitting maritime tort suits which had accrued prior to the effective date of Section 763(a) to be filed within three years after the effective date of this statute, or thereafter be time-barred. No other reported decision regarding the effect of Section 763(a) has involved a claim that accrued *prior* to the effective date of

the statute and suit was filed thereon *more than three years after* the effective date of the statute.

Furthermore, the lower courts' ruling on the laches issue is correct, and merely entails the application of the familiar standard for Motions for Summary Judgment under Rule 56. The conclusion of the District Court and Court of Appeals below on the laches issue represents an independant basis for the dismissal of Cooper's unseaworthimess claim, and the exercise of the Court's discretionary powers to review this issue is not justified.

ARGUMENT

Effect of 46 U.S.C. Section 763(a)

Cooper suggests on page 1 of her petition that there is a "conflict" between the Eleventh Circuit's decision in *Fordham v. Belcher Company,* 710 F.2d 709 (11th Cir. 1983) and the Ninth Circuit's decision in *Friel v. Cessna Aircraft Company,* 751 F.2d 1037 (9th Cir. 1985) and that the Fifth Circuit's opinion in this case resulted from an improper interpretation of *Friel.* See page 6 of Cooper's petition. These suggestions are spurious. *Fordham* and *Friel* differ only in result, not in principle. The Fifth Circuit's decision herein, limited to a distinct set of facts, does not call the rationale of either decision into question.

Fordham and *Friel,* the only other appellate decisions addressing the effect of 46 U.S.C. Section 763(a), involved different competing statutes of limitations. In *Fordham,* the defendant contended that Section 763(a) retroactively time-barred general maritime law negligence claims that were otherwise governed by laches. These claims had accured on November 16, 1978 and were filed on August 11,

1982. 710 F.2d at 710. *Friel*, on the other hand, involved a claim under the Death on the High Seas Act (DOHSA), 46 U.S.C. Section 761, that had accrued on July 23, 1980 and was filed on October 18, 1982. On the date the Friel claim accrued, the two-year limitation period of 46 U.S.C. Section 763 was in effect. Significantly, in *Friel* and *Fordham*, the claims had accrued prior to the effective date of Section 763(a), but suit was filed in each instance within three years of October 6, 1980, the effective date of Section 763(a).

Both counts recognized that statutes "generally operate prospectively only." *Fordham*, 710 F.2d at 710. *Friel*, 751 F.2d at 1039. However, the *Friel* Court invoked a long-recognized exception to that generality: applying statutes which are addressed to remedies or procedures to pending cases when it does not otherwise alter substantive rights. *Id.* The retroactive application of Section 763(a) in *Friel* preserved the plaintiff's claim by extending the applicable limitation period from two years to three. *Id.* at 1038. Thus, retroactive application of a Section 763(a) in that instance did not alter any substantive rights, the potential danger entailed by retrospective application of a newly-created statute of limitation. *Id.* at 1039 n. 4. The *Fordham* Court, on the other hand, cound not apply Section 763(a) retroactively because to do so would alter the plaintiffs' substantive rights. Notably, *less* than three years had elapsed from the time of *Fordham* plaintiff's accident to the filing of suit. 710 F.2d at 710.

Neither the *Fordham* Court not the *Friel* Court were confronted with the fact situation present in the instant case. Cooper's unseaworthiness claim accrued April 4, 1979, over a year and six months prior to the enactment of Section 763(a). However, she did not file suit until

November 14, 1983, more than three years after Section 763(a) took effect. Thus, over four and a half years elasped between the date of injury and the filing of suit.

In applying the three-year limitation period of Section 763(a) to Cooper's unseaworthiness claim, the Fifth Circuit did not apply the limitation period retroactively to the date her claim accrued. Rather, the Court of Appeals applied the limitation period *from* October 6, 1980, the effective date of Section 763(a). Thus, if Cooper would have filed her unseaworhtiness claim within four years and six months from the date of her injury, i.e., within three years of October 6, 1980, her claim would not have been time-barred. Ironically, if Cooper had been injured nineteen months later and she filed suit at the same time as she did in this case, Section 763(a) would have unquestionably time-barred her claim, under any interpretation of 46 U.S.C. Section 763(a).

In applying Section 763(a) to Cooper's claim, the Fifth Circuit adhered to a well-established principle of statutory construction:

> A newly-created statute of limitation would not violate the Constitution by divesting a vested right if it allows a reasonable time for those affected by the Act to asert their rights.

799 F.2d at 178 *citing Fust v. Arnar-Stone Laboratories, Inc.*, 736 F.2d 1098, 1100 (5th Cir. 1984). The Court of Appeals reasoned that the three year limitation period of Section 763(a) was a reasonable time within which to file suit.[1]

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[1] Indeed, Congress previously made the determination that three years was a reasonable time within which to file a maritime tort claim when it enacted Section 763(a). Three years is also the limitation period

Accordingly, the court held that "a claim which accrued prior to the date of passage of Section 763(a) remains viable for three years after the date of passage of that statute and thereafter succumbs to the absolute bar impressed by Congress." *Coooper,* 799 F.2d at 178.

Long ago, in *Sohn v. Waterson,* 84 U.S. 737, 17 Wall. 596, 21 L.Ed. 737 (1873), this Court approved of the application of a newly-created statute of limitation in cases under facts similar to those herein. In *Sohn,* an Ohio citizen sued a Kansas citizen in the United States Circuit Court for the District of Kansas six years after the cause of action accrued. The Kansas defendant pled the two-year limitation period of the Kansas statute of limitations. The issue at bar was whether to apply the Kansas statute of limitations, enacted more than four years after the cause of action accrued. The Ohio plaintiff argued that the statute could not apply to actions that had accrued prior to its enactment. The Circuit Court held that since the defendant was a Kansas resident when the act took effect, the limitation period commenced from the date the act took effect, and the action could have been brought within two years afterwards. *Id.* at 738. This Court recognized that "a statute of limitations may, undoubtedly, have effect upon actions which have already accrued as well as upon actions which accrue after its passage." *Id.* After analyzing two other methods of statutory construction, the *Sohn* Court determined:

(footnote 1 continued)
utilized under the Jones Act, 46 U.S.C. Section 688, which governed Cooper's negligence claim against Diamond M arising out of the same incident. Under the doctrine of laches, the limitation period of the Jones Act is the analogous limitation period. *See McAllister v. Magnolia Petroleum Corporation,* 357 U.S. 221, 224, 78 S.Ct. 1201, 1204, 2 L.Ed.2d 1272 (1958).

> [a] third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. It was substantially adopted by this court in the cases of *Ross v. Duval*, 13 Pet. 62, and *Lewis v. Lewis*, 7 How. 778. In those cases certain statutes of limitation -- one in Virginia and the other in Illinois -- had originally excepted from their operation nonresidents of the state, but this exception had been afterwards repealed; and this court held that the non resident parties had the full statutory time to bring their actions after the repealing acts were passed, although such actions may have accrued at an earlier period. "The question is," says Ch. J. Taney, "from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.

Id. at 738-739.

Since *Sohn* your Honors have consistently recognized:

> [i]t is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.

Wheeler v. Jackson, 137 U.S. 245, 255, 11 S.Ct. 76, 78, 34 L.Ed. 659 (1890)(citations omitted). *See also United States v. Morena*, 245 U.S. 392, 397, 38 S.Ct. 151, 152, 62 L.Ed.

359 (1918); *Capitan Grande Band of Mission Indians v. Helix Irrigation District,* 514 F.2d 465, 468 (9th Cir.), *cert. den.,* 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975); *Carscadden v. Territory of Alaska,* 105 F.21d 377, 380 (9th Cir. 1939)).

Neither the *Friel* or *Fordham* Courts considered the rule of construction endorsed by this Court in *Sohn,* and indeed, could not have been expected to because in both cases the plaintiffs had filed suit within three years after the enactment of 46 U.S.C. Section 763(a). The Fifth Circuit's rationale in this case does not conflict with any decision addressing Section 763(a), and is consistent with numerous decisions of this Court interpreting statutes of limitation under similar circumstances.

Diamond M Company further submits that this Court should not exercise its descretion to review this case since the instant decision will have insignificant impact. At present, over five years and six months have elapsed since the passage of 46 U.S.C. Section 763(a). Surely, very few, if any, unseaworthiness claims occurring prior to October 6, 1980, are pending in the lower courts. This case simply will not have such an impact as to warrant the invocation of discretionary jurisdiction.

Laches

The District Court below dismissed Cooper's unseaworthiness claim on the basis of laches. Under the doctrine of laches, if suit is not filed within the analogous limitation period, the plaintiff has the burden of proving that the delay in filing suit was excusable, or that the defendant was not prejudiced by the delay. *Watz v. Zapata off-Shore Company,* 431 F.2d 100, 111 (5th Cir. 1970).

As stated in the Fifth Circuit's opinion, the District Court found that Cooper failed to demonstrate either that Diamond M was not prejudiced by the excessive delay in filing suit, or that the delay was excusable. 799 F.2d at 177. *See also* Supplemental Appendix (Opinion of the District Court).

Diamond M. Company, in support of its Motion for Summary Judgment, submitted the affidavit of its claim manager, Kenneth Bradley. Bradley's affidavit established that Cooper's supervisor, Hubert Boeckle, had died on April 23, 1982 -- over three years after Cooper's cause of action accrued. Had Cooper filed suit timely, Diamond M would have been able to perpetuate testimony of Boeckle, a crucial witness that would have had knowledge of the state of the equipment allegedly leading to Cooper's accident and her post-accident physical condition as well. *Cooper,* 799 F.2d at 177.

The District Court concluded:

> Plaintiff has not met her burden to show defendant is not unduly prejudiced. Plaintiff offered no facts showing Mr. Boeckle's testimony is not material, or perhaps cummulative, or that defendant's investigation was sufficient to defend this lawsuit, despite a continuance of the trial date to allow such discovery, and two requests by the Court.

See Supplemental Appendix at page A-3.

The Court of Appeals concurred with the District Court's conclusion, stating:

> We agree with the district court that, in the absence of application of Section 763(a), Cooper

> cannot sustain her burden of proof under laches to show reasonable delay and absence of prejudice. Thus, this is not a case which would be "otherwise viable under the doctrine of laches."

799 F.2d at 178, n. 2.

Cooper's petition fails to establish any of the justifications under Supreme Court Rule 17 requiring a discretionary review of the lower courts' treatment of the laches issues. Cooper simply did not make the necessary factual showing required by Federal Rule of Civil Procedure 56(e) although the trial was continued and the District Court specifically requested discovery from Cooper on the issue of prejudice on two occasions. *Id.* at 177. As the Court of Appeals stated, after the Joint Motion for Summary Judgment was filed on March 7, 1985, "Cooper had submitted no additional affidavits or depositions contradicting the evidence of prejudice contained in the Bardley affidavit." *Id.* The lower courts' treatment of the laches issue is consistent with this Court's recent decision of *Celotex Corporation v. Catrett*, ____U.S.____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In *Celotex*, your Honors held:

> In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made and relies solely on the "Pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made in support as is provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file" designate

> "specific facts showing that there is a genuine issue for trial."

Id. at 2553.

The rulings on the laches issue do not involve any novel questions of law, nor is there a conflict between the circuits.[2] Of course, the lower courts' ruling on laches represents another bais for the dismissal of Cooper's unseaworthiness claim. Thus, should your Honors question the rationale of the Fifth Circuit Court of Appeals on its interpretation of 46 U.S.C. Section 763(a), a dismissal of Cooper's unseaworthiness claim, based on laches, remains appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari filed by Jewel M. Cooper should be denied.

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[2] It is noted that the statements made by Cooper on page 10 of her brief regarding the reporting of the accident, failure to take corrective measures, etc. are totally unsupported by the record and should be disregarded.